Fairise Odyssey Sdn Bhd v Tenaga Nasional Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-496 OF –2011
SM KOMATHY JC
16 JULY 2014

Tort — Trespass to land — Encroachment — Erection of fixtures — Company purchased parcel of alientated land through which ran high tension power transmission line — Transmission line erected 17 years when land was still state line — Whether there was written proof that state authority had approved construction of transmission line on land — Claim for damages — Application to remove transmission line — Whether approval of state authority binds all parties who have taken ownership of land

The plaintiff company purchased a parcel of land ('the subject land') in 2010 through which ran a high tension power transmission line ('transmission line'). The transmission line had been erected 17 years earlier in 1993, by the defendant ('TNB'), when the subject land was still state land, and before its alienation to the plaintiff's predecessors in title. The plaintiff objected to the existence of the transmission line on account of TNB's inability to produce any written proof to show that the state authority had approved the construction of the same on the subject land. The plaintiff brought this action against the defendant seeking, inter alia, the removal of the transmission lines; a declaration that the use and/or possession of the disputed area by the defendant was unlawful and void ab initio; damages for trespass over the disputed area; aggravated and exemplary damages; and an order that the defendant shall deliver vacant possession of the disputed area to the plaintiff within seven days from the date of the order. The plaintiff relied strongly on an official search conducted at the Land Office which did not indicate any endorsement on the register document of title to show the existence of the transmission line on the subject land. The plaintiff contended that the transmission line constituted a continuing trespass to land because it had been erected without the approval of the state authority. On the other hand, TNB denied trespass as alleged. It averred that it had the approval of the state authority to do so by relying on implied approval. The issue that arose for the court's determination was whether the state authority had given their approval to the defendant to construct, install and lay a 132 KV transmission line ('TNB Transmission Lines') over the plaintiff's land which at the material time was state owned land involving approximately 5.4643 hectares ('the disputed areas') out of the total of 144.272 hectares alienated, and if in the affirmative whether such approval binds all parties who have taken ownership of the subject land including the plaintiff.

Held, dismissing the claim with costs of RM30,000:

(1) The 1990 Act is applicable to the instant case as the erection of the transmission line had commenced only in 1992. In any event, whether it is the 1949 or 1990 Act, both Acts require TNB to obtain the approval of the state authority. The answer to the question whether the approval must be in writing, turns on the meaning to be accorded to the word 'approval' in both the provisions. The argument of the plaintiff fatally requires reading into the provisions words which simply are not there. If indeed the draftsman had intended to give the word 'approval' a restrictive meaning as contended for by the plaintiff, he could have done so by express provision. The draftsman could have easily inserted the words 'in writing' to the provision. In the absence of express words requiring the approval to be in writing, the statutory language must be read in its plain and ordinary context. The words in both provisions permit both express and implied approval of the state authority. This interpretation accords with an important principle that in trespass, consent whether, express or implied affords a good defence (see paras 27 & 33).

(2) The State Executive Committee minutes of 8 August 1990 clearly demonstrated that the state authority was aware of TNB's plan to erect a transmission line which would run from Kuala Pilah to Gemas. The minutes further showed that it was for this specific reason that the state authority had alienated land to TNB for the construction of a TNB substation on the land. A substation without a transmission line would serve no purpose. It was the transmission line, that connected the electricity system from Kuala Pilah to Gemas. It facilitated the transfer of power to consumers from the power stations and substations. For these reasons, it appeared that the state authority not only did not object but approved the construction of the transmission lines. By their conduct, the state authority had implicitly approved the erection of the transmission line on the land (see para 41).

(3) The absence of any endorsement on the register of title, did not vitiate the implied consent given to TNB. The existence of the transmission lines was not endorsed on the register document of title as no survey has been done as the land was still held under a qualified title. It would be endorsed on the final title only after a survey was done (see para 42).

(4) The transmission line had been on the subject land since 1992. There is no evidence that any of the original owners had ever objected to the presence of the transmission line. Where there is a lengthy period during which materials remain on the land without objection or without a request for those materials to be removed, the law does not permit a landowner to assert a claim in trespass. In the instant case, there was no evidence that either the state authority or Metro Angkasa or CIMB had protested about the transmission line. A trespass could not constitute a

continuing trespass if it never constituted a trespass to begin with. The plaintiff had failed to prove continuing trespass as the evidence demonstrates that TNB had the approval of the state authority (see para 43).

[Bahasa Malaysia summary

Syarikat plaintif membeli sebidang tanah ('tanah subjek') pada 2010 yang dilintasi satu talian transmisi kuasa bervoltan tinggi ('talian transmisi'). Talian transmisi itu telah didirikan 17 tahun terdahulu pada 1993, oleh defendan ('TNB'), apabila tanah subjek masih lagi tanah negeri, dan sebelum pemindahan milikan kepada pemilik terdahulu plaintif. Plaintif membantah kepada kewujudan talian transmisi atas alasan ketidakmampuan TNB untuk mengemukakan apa-apa bukti bertulis untuk menunjukkan bahawa pihak berkuasa negeri telah meluluskan pembinaan talian tersebut di atas tanah subjek. Plaintif memulakan tindakan ini terhadap defendan menuntut antara lain, pengalihan talian transmisi tersebut; satu deklarasi bahawa penggunaan dan/atau milikan kawasan yang dipertikaikan oleh defendan adalah menyalahi undang-undang dan *void ab initio*; ganti rugi untuk pencerobohan terhadap kawasan yang dipertikaikan; ganti rugi teruk dan teladan; dan satu perintah bahawa defendan perlu menyerahkan milikan kosong kawasan yang dipertikaikan kepada plaintif dalam tempoh tujuh hari daripada tarikh perintah. Plaintif bergantung kuat pada carian rasmi yang dilakukan di Pejabat Tanah yang tidak menunjukkan apa-apa pengendorsan pada daftar hakmilik untuk menunjukkan kewujudan talian transmisi di atas tanah subjek. Plaintif menghujah bahawa talian transmisi merupakan pencerobohan berterusan ke atas tanah tersebut kerana ia telah dibina tanpa kebenaran pihak berkuasa negeri. Sebaliknya, TNB menafikan pencerobohan seperti yang didakwa. TNB menegaskan bahawa ia telah mendapat kelulusan daripada pihak berkuasa negeri yang membenarkannya dengan bergantung kepada kelulusan secara tersirat. Isu yang timbul untuk penelitian mahkamah adalah sama ada pihak berkuasa negeri telah memberikan kelulusan mereka kepada defendan untuk membina, memasang dan meletakkan satu talian transmisi 132 KV ('Talian Transmisi TNB') melalui tanah plaintif yang pada masa material merupakan tanah yang dimiliki negeri melibatkan kira-kira 5.4643 hektar ('kawasan yang dipertikaikan') daripada keseluruhan 144.272 hektar yang dipindah milik, dan sekiranya disahkan sama ada kelulusan tersebut mengikat semua pihak yang mengambil milikan tanah subjek termasuk plaintif.

Diputuskan, menolak tuntutan dengan kos sebanyak RM30,000:

(1) Akta 1990 terpakai dalam kes ini memandangkan pembinaan talian transmisi bermula hanya pada tahun 1992. Dalam mana-mana keadaan, sama ada Akta 1949 atau 1990, kedua-dua Akta memerlukan TNB untuk mendapatkan kebenaran pihak berkuasa negeri. Jawapan kepada soalan sama ada kebenaran perlu dibuat secara bertulis, merujuk kepada

maksud yang diberikan kepada perkataan 'kelulusan' dalam kedua-dua peruntukan. Hujahan plaintif malangnya memerlukan penelitian peruntukan yang sememangnya tiada. Sekiranya pendraf sememangnya berniat memberikan maksud yang terhad kepada perkataan 'kelulusan' seperti yang ditegaskan oleh plaintif, dia boleh berbuat demikian melalui peruntukan tersurat. Pendraf dengan mudahnya boleh memasukkan perkataan 'secara bertulis' ke dalam peruntukan. Dalam ketiadaan perkataan tersurat yang memerlukan kelulusan dibuat secara bertulis, bahasa statutori perlu dibaca dalam konteks asal dan kebiasaannya. Perkataan dalam kedua-dua peruntukan membenarkan kelulusan secara tersurat atau tersirat daripada pihak berkuasa negeri. Pentafsiran ini selaras dengan prinsip penting bahawa dalam pencerobohan, kebenaran sama ada tersurat atau tersirat memberikan pembelaan yang baik (lihat perenggan 27 & 33).

(2) Minit Jawatankuasa Eksekutif Negeri pada 8 Ogos 1990 jelas menunjukkan bahawa pihak berkuasa negeri mengetahui rancangan TNB untuk membina satu talian transmisi yang akan bermula dari Kuala Pilah ke Gemas. Minit tersebut seterusnya menunjukkan bahawa ia adalah untuk sebab khusus inilah pihak berkuasa negeri telah memindah hakmilik tanah kepada TNB bagi pembinaan pencawang TNB di atas tanah tersebut. Sebuah pencawang tanpa talian transmisi adalah tidak berguna. Talian transmisi yang menghubungkan sistem elektrik dari Kuala Pilah ke Gemas. Ia memudahkan pemindahan kuasa kepada pengguna dari stesen-stesen kuasa dan pencawang. Untuk sebab-sebab ini, ia kelihatan bahawa pihak berkuasa negeri bukan sahaja tidak membantah tetapi meluluskan pembinaan talian transmisi. Melalui tingkah laku mereka, pihak berkuasa negeri secara tidak langsung telah meluluskan pembinaan talian transmisi di atas tanah (lihat perenggan 41).

(3) Ketiadaan apa-apa pengendorsan dalam daftar hakmilik tidak membatalkan kelulusan tersirat yang diberikan kepada TNB. Kewujudan talian transmisi tidak diendorskan dalam daftar hakmilik memandangkan tiada penyiasatan dilakukan kerana tanah tersebut masih dipegang di bawah hakmilik berkelayakan. Ia akan diendorskan dalam hakmilik mutlak hanya selepas penyiasatan dilakukan (lihat perenggan 42).

(4) Talian transmisi telah berada di tanah subjek sejak tahun 1992. Tiada keterangan bahawa mana-mana pemilik asal pernah membantah kepada keberadaan talian transmisi tersebut. Di mana terdapat jangka masa yang panjang semasa material tersebut kekal di atas tanah tanpa bantahan atau tanpa permintaan untuk material tersebut dikeluarkan, undang-undang tidak membenarkan pemilik tanah untuk menegaskan tuntutan berhubung pencerobohan. Dalam kes ini, tiada keterangan bahawa sama

ada pihak berkuasa negeri atau Metro Angkasa atau CIMB telah memprotes mengenai talian transmisi tersebut. Satu pencerobohan bukanlah pencerobohan yang berterusan sekiranya ia bukannya pencerobohan dari permulaanya. Plaintif telah gagal untuk membuktikan pencerobohan berterusan memandangkan keterangan menunjukkan bahawa TNB telah mempunyai kelulusan daripada pihak berkuasa negeri (lihat perenggan 43).]]

Notes

For cases on encroachment see 12 (2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2127—2134.

Cases referred to

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123, FC (refd)

Karuppannan v Balakrishnen (Chong Lee Chin & Ors, Third Parties) [1994] 3 MLJ 584, FC (refd)

Multi-Purpose Bank Bhd v Diamond Agreement Sdn Bhd [2000] 5 MLJ 576, HC (refd)

PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)

Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang — which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990) [2010] 2 MLJ 155, FC (folld)

Legislation referred to

Electricity Act 1949 (repealed by the Electricity Supply Act 1990) ss 52, 55(1), (2)
Electricity Supply Act 1990 ss 5, 12, 13, 14(1), (2), (5), 15
Interpretation Acts 1948 and 1967 ss 3, 17A
Laws of the Constitution of Negeri Sembilan
National Land Code ss 5, 12, 13, 15

Ben Chan Chong Choon (Norashikin Amiruddin with him) (Mah-Kamariyah & Philip Koh) for the plaintiff.

Alvin John (V Vishnu Kumar with Thinagaran Batumalai with him)(Alvin John & Partners) for the defendant.

SM Komathy JC:

[1] The plaintiff company purchased a parcel of land ('the subject land') in 2010 through which ran a high tension power transmission line ('transmission line'). The transmission line had been erected 17 years earlier in 1993, by the defendant, Tenaga Nasional Bhd ('TNB'), when the subject land was still state

land, and before its alienation to the plaintiff's predecessors in title. The plaintiff objects to the existence of the transmission line on account of TNB's in ability to produce any written proof to show that the state authority had approved the construction of the same on the subject land.

[2] The plaintiff brings this action against the defendant seeking, inter alia, the removal of the transmission lines and other reliefs as below:

(a) a declaration that the use and/or possession of the disputed area by the defendant is unlawful and void ab initio;

(b) damages to be assessed and paid by the defendant to the plaintiff in respect of the loss of the disputed areas by reason of para 11 above;

(c) damages to be assessed and paid by the defendant to the plaintiff in respect of the loss of value to the land by reason of para 12 above;

(d) damages for trespass over the disputed area;

(e) aggravated and exemplary damages; and

(f) an order that the defendant shall deliver vacant possession of the disputed area to the plaintiff within seven days from the date of the order.

THE FACTS

[3] The background facts which gave rise to the dispute may be stated briefly. The subject land is HS(D) No 10045, PT No 3980, Mukim Gemas, District of Tampin, Negeri Sembilan measuring about 144.272 hectares. It was originally state land which belonged to the Negeri Sembilan Government. In the 1980's the state government decided to develop the subject land into an industrial zone. It therefore approved the alienation of the subject land to one Metro Angkasa Sdn Bhd ('Metro Angkasa') in 1990. The alienation was cancelled in 1992 when Metro Angkasa failed to pay the land premium within the stipulated period.

[4] In 1992, TNB engaged HG Power Transmission Sdn Bhd ('HG Power') for the construction, installation and laying of the transmission line on the subject land. On 2 November 1993, HG Power completed the work and a 'Taking Over Certificate' was issued by TNB. About a year later, sometime in November 1994, TNB issued a 'Completion Certificate' to HG Power.

[5] In the meantime, Metro Angkasa successfully appealed against the cancellation of the sale of the subject land to it. On 22 October 1993, the subject land was re-alienated to it.

[6] Sometime in March 1996, Metro Angkasa charged the subject land as security to Southern Bank for banking facilities granted to it. The subject land was foreclosed when Metro Angkasa defaulted in its monthly payments and sole to CIMB Bank Bhd ('CIMB') on 2 August 2006. On 11 January 2010, CIMB entered into a sale and purchase agreement to sell the subject land to one Elitprop Sdn Bhd ('Elitprop'). The agreement expressly stated that the purchase was on an 'as is where is basis'. At the request of Elitprop, CIMB transferred the subject land directly to the plaintiff, its nominee, by way of an agreement dated 1 November 2010.

[7] On 30 December 2010, when the plaintiff became the registered proprietor of the subject land, it objected to the existence of the transmission line which occupied about 5.4643 hectares ('the affected land') of the subject land. The subject land is still held by the plaintiff under a qualified title. There is no endorsement on the document of title to show any encumbrance or the existence of the transmission lines on the subject land.

[8] On 30 May 2011, the plaintiff instituted this action against TNB alleging continuing trespass. It was alleged that the transmission lines had been erected on the subject land without the approval of the state authority. In support of its case, the plaintiff relied strongly on an official search conducted at the land office on 25 January 2011 which did not indicate any endorsement on the register document of title to show the existence of the transmission line on the subject land.

TNB SUBSTATION

[9] It is not disputed that on 25 August 1992, a separate individual title was issued and registered in the name of TNB for a strip of land known as HS (M) 1561, PT No 3926, Mukim Gemas, State of Negeri Sembilan, measuring 2.2356 hectares. The strip of land had originally been part of the subject land until it was carved out by the state authority and given to TNB for the construction of a power substation ('TNB substation'). The transmission line is connected to the TNB substation and forms part of the electricity grid that supplies power to residents living in the area from Gemas to Kuala Pilah.

LLN AND INCORPORATION OF TNB

[10] Before moving on to the arguments of the parties, it would be useful to set forth some historical facts. Prior to 1990, the supply of electricity and matters connected to it were carried by Lembaga Letrik Negara ('LLN'). On 12 July 1990, TNB was incorporated as a public company limited by shares. By

virtue of the Electricity Supply (Successor Company) Act 1990 which came into effect on 1 September 1990, all property, rights and liabilities of LLN became vested in TNB.

[11] With the privatisation of the nationalised electricity industry, TNB was required to follow the provisions in the said Electricity Act.

THE ARGUMENTS OF PARTIES

[12] The plaintiff contended that the transmission line constituted a continuing trespass to land because it had been erected without the approval of the state authority. The plaintiff relied on a passage in the judgment of Lamin FCJ in *Karuppannan v Balakrishnen* [1994] 3 MLJ 584 to submit that the fact that the plaintiff was not the owner of the subject land at the time of the erection of the transmission line did not preclude it from suing for trespass:

> As we have said, in the case of a trespass to land and airspace committed by the owner of an adjacent lot as serious as in this case, the aggrieved owner of the lot upon which trespass is committed is entitled to an interlocutory mandatory injunction by which to have the source of the trespass removed notwithstanding that the source of the trespass had already been in existence before the new owner came to own the land and whether or not he knew or had notice of it.

[13] On the other hand, TNB denied trespass as alleged. It averred that it had the approval of the state authority to do so. It relied on implied approval. The main thrust of TNB's submission was that it was improbable that the state authority would have alienated the land for the construction of the TNB substation, if it had not approved the erection of the transmission line on the subject land. A substation served no purpose unless it was connected to the electricity grid by the transmission line. The state authority had implicitly given its approval for the erection of the transmission line when it approved the construction of the TNB substation.

ISSUE

[14] The parties framed the following issue of fact for the court's determination:

> Whether the state authority had given their approval to the defendant to construct, install and lay a 132 KV transmission line ('TNB Transmission Lines') over the plaintiff's land which at the material time was State owned land involving approximately 5.4643 hectares (the 'Disputed Areas') out of the total of 144.272 hectares alienated, and if in the affirmative whether such approval binds all parties who have taken ownership of the subject land including the plaintiff?

A WITNESSES

[15] The plaintiff and defendant each called two witnesses. The plaintiff called its manager Tan Lee Chin, and Lee Chee Keong, a licensed land surveyor. TNB called Khairil Anuar bin Karim ('Khairil'), a deputy registrar at the Negeri Sembilan Land and Mines Office and its general manager, Hashim bin Ismail.

[16] The plaintiff's manager testified that prior to the purchase of the subject land, an official search was conducted on 9 November 2009 at the relevant Land and Mines Office at Gemas. The search did not indicate that the subject land or any part thereof was subjected to any encumbrance. The plaintiff was required and had paid quit rent to the state government for the entire subject land, including the affected area for the years 2011, 2012, and 2013.

[17] The land surveyor confirmed that he had conducted a survey of the subject land at the request of the plaintiff. He duly notified the plaintiff of the existence of the transmission line. He also confirmed that the plaintiff proceeded with the sale despite being aware of the transmission line.

[18] En Khairil who testified for TNB as a subpoenaed witness, said that it is not the policy of the state to acquire land for the construction of transmission lines. Acquisition is undertaken only for the construction of substations. He went on to add that the contemporaneous documents indicated that TNB had the approval of the state authority to erect the transmission line and produced minutes of state executive committee meetings. When asked to explain the existence of the transmission line, he said:

> S: Adakah kemasukan defendan di tanah subjek telah mendapat kebenaran daripada pihak berkuasa negeri?
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> J: Ya, sudah tentu kemasukan defendan di tanah subjek adalah berdasarkan kebenaran pihak berkuasa negeri.
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> S: Adakah kebenaran tersebut telah diberikan secara bertulis?
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> J: Mengikut rekod yang ada pada saya, tiada sebarang kebenaran bertulis tetapi segala dokumen-dokumen kontemporari menunjukkan bahawa kemasukan defendan di tanah tersebut adalah berdasarkan kebenaran pihak berkuasa negeri.
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> Sebagai contoh, Petikan Peringatan Majlis Mesyuarat Kerajaan bertarikh 08.08.1989 (m/s 142 B3) telah meluluskan pemberimilikan tanah tersebut kepada Metro Angkasa dengan pengindorsan mengenai bekalan elektrik yang merujuk secara spesifik bahawa pejabat Tanah Daerah Kecil Gemas telah meluluskan pencawang elektrik defendan.
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> Selain itu, di bawah seksyen 52 Akta Letrik 1949, Pejabat Tanah dan Galian Negeri Sembilan tidak perlu mengisukan sebarang notis statutory bagi kebenaran

membina talian pencawang kepada defendan.

PBN tidak pernah membantah kemasukan defendan di tanah tersebut.

[19] TNB's second witness, its general manager testified that by way of letter dated 26 December 1989, LLN had applied to the state for approval to erect the transmission lines on the subject land. The letter read:

Saya dengan hormatnya merujuk kepada perkara di atas.

Adalah dimaklumkan di sini bahawa Lembaga bercadang untuk mendirikan satu talian elektrik yang bermula dari pencawang Kuala Pilah ke pencawang Segamat. Ini adalah bertujuan untuk memperkukuhkan bekalan elektrik ke kawasan Kuala Pilah, Jempol, Tampin dan Segamat serta kawasan sekitarnya.

Dengan itu saya kepilkan di sini satu set pelan No. 3 CCE/TCE/22971 yang menunjukkan cadangan talian elektrik tersebut untuk makluman dan tindakan tuan selanjutnya memberikan komen dan ulasan ke pejabat ini.

Atas kerjasama dan jawapan tuan yang awal saya dahului dengan ucapan banyak terima kasih.

[20] Continuing with his evidence, he added that the state did not object at any stage and had permitted LLN to proceed with the construction work in accordance with the plans submitted to the state earlier. Under cross-examination, he accepted that LLN did not obtain the 'written approval' of the state for the erection of the transmission line.

LAW ON TRESPASS

[21] Before turning to consider the agreed issues, it is convenient to set out the legal principles that apply to trespass of land. The law of trespass to land was designed to protect security of possession and to deter violations of the sanctity of property. Trespass to land is the act of entering upon land in the possession of another or placing or throwing or erecting some material object thereon without the legal right to do so. Trespass to land is actionable even if it is unintentional.

[22] John G Fleming in his book, *The Law of Torts*, (8th Ed) (Sydney: Law Book, 1992) said at pp 42-43:

If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitutes an actionable wrong. There is a 'continuing trespass' as long as the object remains; and on account of it both a subsequent transferee of the land may sue and a purchaser of the offending chattel or structure be liable, because the wrong gives rise to actions de die in diem until the condition is abated. ... In all these cases, the plaintiff may maintain successive actions, but, in each, damages are assessed only as accrued up to the date of the action ....

[23] It is elementary that a trespass cannot constitute a continuing trespass if it never constituted a trespass to begin with. No continuing trespass of land will be committed by a defendant who has the express or tacit consent of the original owner of a land to erect a structure on the said land. In such circumstances the defendant is said to come on such land by the leave and licence of the plaintiff.

SUB-ISSUES

[24] Before answering the agreed issue in this case, I would like to deal with two sub issues taken by the plaintiff. First, that the approval for TNB to construct the transmission line must be in writing and second, that the approval must be given by the State Executive Committee. I take first the question of whether the approval has to be in writing?

Sub-issue 1: Whether approval must be in writing?

[25] To determine this question, it is necessary to examine the statutory provision governing the installation of transmission lines on state land. The Electricity Act 1949 ('the 1949 Act') governed the installation of transmission lines on state land until 1990. The relevant provision in the 1949 Act was s 52 which read (Emphasis added):

> For the purposes of constructing a supply line for any Board installation, the Chairman or any person authorised by him in that behalf may, at all reasonable times, enter upon any State land and may, *subject to the approval of the state authority*, erect in or upon that state land such posts and other apparatus as may be necessary or proper for the purposes of the installation, and may carry out all necessary works in connection therewith, and may, in the course thereof, fell or lop trees, remove vegetation and do all other things necessary to the said purposes:
>
> Provided that:
>
> (a) When any such work interferes with improvements, buildings, growing trees or crops, the Board shall pay compensation in accordance with section 58 for disturbance or damage; and
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> (b) where the land is occupied under a license for temporary occupation, the compensation shall be paid to the occupant under the license, and where the land is occupied under an approved application, such compensation shall be paid to the applicant recorded in the roll of approved applications, by whatever name such roll is called in the State wherein the land is situate.

[26] As noted earlier, some 40 years later, the 1949 Act was repealed and the Electricity Supply Act 1990 ('the 1990 Act') came into force. Under the new Act, the installation of transmission lines by TNB on state land is governed by s 12. It provides (Emphasis added):

> (1) Subject to the *approval of the state authority* and to such conditions as the

state authority may deem proper, a licence may extend to authorizing the licensee to lay, place or carry on, under or over State land, to the extent and in the manner specified in the licence, such supply lines and to erect and maintain in or upon State land such posts and other equipment as may in the opinion of the Commission be necessary or proper for the purposes of the licensed installation, and subject always to the approval of the state authority, the said authorisation may be given or added to at any time during the currency of the licence by endorsement thereon under the seal of the Commission.

(2) All equipment placed in or upon State land which is not removed therefrom within six months, or such longer period as the State Government may permit, after the expiration or early determination of the licence under the authority whereof the same was so placed, shall vest in and become the property of the Government of the State wherein the same is situated.

[27] There was disagreement between the parties as to whether the 1990 Act or its precursor 1949 Act that was applicable to the present case. I am inclined to agree with the plaintiff that it is the 1990 Act that is applicable to the instant case as the erection of the transmission line had commenced only in 1992. In any event, whether it is the 1949 or 1990 Act, both Acts require TNB to obtain the approval of the state authority. The answer to the question whether the approval must be in writing, turns on the meaning to be accorded to the word 'approval' in both the provisions.

[28] TNB took the stand approval in writing was not a statutory requirement under either of the Acts. It was pointed out that neither s 52 of the 1949 Act nor s 12 of the 1990 Act specifically stated that the approval must be in writing. The court was urged to give an expanded interpretation to the word 'approval' in both the provisions as such an interpretation would not be inconsistent with the purpose of the provisions.

[29] The plaintiff responded by saying that the court should not countenance the interpretation contended for by the defendant as its effect would lead to uncertainty and the law will be in a state of mess.

[30] It is a fundamental principle of statutory construction that words in a statute must be given their plain, ordinary and natural meaning unless Parliament cannot have intended this meaning because it gives rise to difficulties which are so serious as to make the statutory provision unworkable or impracticable: see *Bennion on Statutory Interpretation* (6th Ed) s 313.

[31] In *Multi Purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576, Jeffrey Tan J explained the principle in these words (at p 590):

As said, the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question. '... the meaning of an enactment must first be penetrated through the medium or vehicle of language; thereafter it is contextualised' (The Interpretation of Statutes, Lourens M du Plessis, para 29). Although it has been said that 'this literal method of construction is now completely out of date' (*United Hokkien Cemetries Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121, per Chang Min Tat FCJ), the first canon of construction — the literal rule — is to give the 'ordinary, plain and natural meaning' of the words contained in a statute (see *Cresswell (Valuation Officer) v BOC Ltd* [1980] 3 All ER 443). 'Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rule of grammar': *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69, per Chang Min Tat FJ. Once the language of an enactment is clear and unambiguous, and 'it is assumed that the legislature used them in the popular sense, unless they have acquired a different technical meaning in legal nomenclature or unless the context or subject matter clearly shows that they were intended to be used in a different case' (*Melvill v The Master* [1984] 3 SA 387 C 394), it should be adhered to as the final and authentic expression of the intention of the Legislature and in consequence as representing the true meaning of the enactment. '... the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed (see *Magor & St Mellons RDC v Newport Corp* [1952] AC 189 at p 191).

The court has no power to change any words used by the Legislature. Further, where the words are simple and clear, it is the duty of the court of law to give those words their natural meaning even though such interpretation leads to apparent anomalies' (*Tan Boon Kean v PP* [1995] 3 MLJ 514 per Mohd Azmi FCJ). '... the duty of the court is simply to give effect to the will of Parliament as expressed in the law'. 'The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation' (see *West Coast Hotel Co v Parrish* (1937) 300 US 379 at p 404, per Sutherland J) Similarly, Cardozo J said in *Sunprinting and Publishing Association v Remington Paper and Power Co Inc* (1923) 130 NE 470 at p 471 : 'We are not at liberty to revise while professing to construe' (*Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 per Edgar Joseph Jr FCJ).

There will be a departure from the literal rule only where 'the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute' (Cross, Statutory Interpretation (1987) p 47) or 'would produce a result repugnant to the other provisions of the Ordinance and defeat their purpose, including one of the principal purposes of the Ordinance' (*Re An Advocate* [1964] MLJ 1, per Wylie CJ) or would give rise to an absurd and unjust situation (*Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35).

[32] In *Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang — which was served with a notice under ss 13 and 16 of the Electricity Supply Act*

1990) [2010] 2 MLJ 155, the Federal Court was required to interpret the word 'upgrading' in s 13 of the 1990 Act . Augustine Paul FCJ in delivering the majority judgment of the Federal Court said (at p 164):

> This raises the question of whether the meaning of the word 'upgrading' in s 13 of the Act is capable of being restricted in order to avoid the hardship. That brings into focus s 17A of the Interpretation Acts 1948 and 1967 ('s 17A') which reads as follows:
>
> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

And later (at p 166) added:

> It follows that s 13 of the Act must be read and understood in the context of the purpose for which it was enacted, that is to say, to serve the interests of the public in the supply of electricity at reasonable prices. There can be no dispute that the need for electricity supply will increase from time to time with the rising population and industrial development. Advances in science and technology may help to maintain prices at a reasonable level in the supply of electricity. Such needs can be met only with changes in the electrical installations which can be even of a very major nature. The unqualified use of the word 'upgrading' in s 13 of the Act supports the view that an upgrading exercise can go to any extent. If it was the intention of Parliament to limit the degree of 'upgrading' that can be carried out then words to achieve that object would have been used as in the case of the New Zealand electrical laws.

He then concluded (at p 168):

> I am therefore of the view that the word 'upgrading' in s 13 of the Act must be given its natural and ordinary meaning as defined in the *Concise Oxford Dictionary* to which reference has been made in an earlier part of this judgment. This meaning accords with the purpose of the Act.

[33] In reliance on the passages above, I am inclined to agree with the liberal interpretation contended for by TNB. In my view, the argument of the plaintiff fatally requires reading into the provisions words which simply are not there. If indeed the draftsman had intended to give the word 'approval' a restrictive meaning as contended for by the plaintiff, he could have done so by express provision. The draftsman could have easily inserted the words 'in writing' to the provision as in the case of the Indian electrical law. In the absence of express words requiring the approval to be in writing, the statutory language must be read in its plain and ordinary context. In my judgment, the words in both provisions permit both express and implied approval of the state authority. This interpretation accords with an important principle that in trespass, consent whether, express or implied affords a good defence.

[34] Accordingly, TNB would not be in contravention of the law if it is able to prove that it had the approval of the state authority, albeit not in writing, to erect the transmission line.

Sub-issue 2: Meaning of state authority

[35] I now consider the second point based on the meaning of the word 'state authority' in in s 52 of the 1949 Act and s 12 of the 1990 Act. The plaintiff argued that it referred to the State Executive Committee, whilst TNB argued that it referred to the Director of Land and Mines.

[36] The plaintiff drew support from the articles in the Laws of Constitution of Negeri Sembilan and s 3 of Part 1 of the Interpretation Acts 1948 and 1967 in support of its argument. Section 3 defines state authority to mean:

> 'state authority' means the Ruler or Yang DiPertuan Negeri of a State and includes, in Negeri Sembilan, the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs.

[37] In further support of this submission, the plaintiff relied on the following passage in the judgment of the Federal Court in *Public Prosecutor v Haji Harun bin Haji Idris* [1977] 1 MLJ 15, at p 20, where it was held:

> It is the Executive Council who is the executive organ of the state authority and exercises executive function in the name of the Ruler.

[38] On the other hand, the defendant referred to ss 5, 12, 13, 15 of the National Land Code and the following passage in the judgment of the Federal Court in *Government of the State of Negeri Sembilan and another v Yap Chong Lan & 12 Others Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Others* [1984] 2 MLJ 123, where Abdoolcader FJ explained (at p 126):

> state authority is defined in s 5 to mean the Ruler or Governor of the State, as the case may be. Section 12(1) provides for the state authority to appoint a Director of Lands and Mines for the State and sub-s (3) of that section specifies his functions, powers, duties and responsibilities. Section 16 enacts provisions for actions by and against the state authority, and sub-s (2) thereof specifically stipulates that any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the state authority shall be brought against the Director of Lands and Mines of the State in the name of his office.

[39] In my judgment, the submission of the plaintiff is the correct one and the approval under the 1949 Act or 1990 Act must be given by the State Executive Committee.

WHETHER APPROVAL WAS GIVEN BY STATE AUTHORITY?

[40] I now come to the critical issue in this case, to wit, did TNB have the implicit approval of the state authority to erect the transmission lines on the land.

[41] The State Executive Committee Minutes of 8 August 1990 clearly demonstrates that the state authority was aware of TNB's plan to erect a transmission line which would run from Kuala Pilah to Gemas. The minutes further show that it was for this specific reason that the state authority had alienated land to TNB for the construction of a TNB substation on the land. A substation without a transmission line would serve no purpose. It is the transmission line, that connects the electricity system from Kuala Pilah to Gemas. It facilitates the transfer of power to consumers from the power stations and substations. For these reasons, it appears to me that that the state authority not only did not object but approved the construction of the transmission lines. In my view, by their conduct, the state authority had implicitly approved the erection of the transmission line on the land. In this regard, I refer to the *kertas kerja* attached to the minutes of the State Executive Committee meeting dated 8 August 1990 (*kertas mesyuarat bil 1168/90*). It read in part as below:

Tujuan

Tujuan kertas kerja ini adalah untuk mendapatkan pertimbangan Majlis Mesyuarat Kerajaan Negeri terhadap:

(i) Permohonan dari Syarikat Metro Angkasa Sdn Bhd untuk memiliki dan memajukan tanah kerajaan seluas 400 ekar di Mukim Kuala Gemas, Daerah Kecil Gemas sebagai kawasan perusahaan;

(ii) ...

Latarbelakang

Kawasan yang dipohon merupakan tanah kerajaan seluas 400 ekar terletak di Mukim Kuala Gemas daerah kecil Gemas. Kawasan ini terletak 23 km di utara Pekan Gemas berhampiran dengan Sungai Gemas dan bersempadan dengan daerah Segamat di Negeri Johor di sebelah selatannya ...

Kemudahan Infrastuktur

Dari segi kemudahan infrastruktur beberapa program pembangunan telah dirancangkan oleh Jabatan-jabatan/Agensi yang terlibat.

Bekalan Elektrik

Pihak LLN telah merancang untuk membina 2 buah Pencawang Masuk Utama (PMU) dikawasan dengan keupayaan 2 x 30 MVA. Projek ini akan dibuat melalui projek pemasangan kabel LLN dari Segamat ke Kuala Pilah yang melalui kawasan Gemas. Sebuah tapak pencawang seluar 4 ekar telah diluluskan oleh Pentadbir Tanah Daerah Kecil Gemas bagi keperluan ini, berdasarkan dengan kawasan tanah yang dimohon.

(Emphasis added.)

[42] In my judgment, the absence of any endorsement on the register of title, does not vitiate the implied consent given to TNB. I accept the evidence of Khairil that the existence of the transmission lines is not endorsed on the register document of title as no survey has been done as the land is still held under a qualified title. It would be endorsed on the final title only after a survey is done.

[43] On the evidence, it is clear that since 1992, the transmission line has been on the subject land. There is no evidence that any of the original owners had ever objected to the presence of the transmission line. Where there is a lengthy period during which materials remain on the land without objection or without a request for those materials to be removed, the law does not permit a landowner to assert a claim in trespass. In the instant case, there is no evidence that either the state authority or Metro Angkasa or CIMB had protested about the transmission line. As noted earlier, a trespass cannot constitute a continuing trespass if it never constituted a trespass to begin with. In the result, I find that the plaintiff has failed to prove continuing trespass as the evidence demonstrates that TNB had the approval of the state authority.

[44] I further hold that this approval binds all parties who have taken ownership of the subject land subsequent to its alienation to Metro Angkasa.

[45] In passing, I note that pursuant to s 55(1) of the 1949 Act read with s 55(2), an occupier or owner may apply to LLN to remove or alter the alignment of electricity pylons and transmission wires and the cost would either be absorbed by LLN or the applicant subject to the state authority's decision based on equity. Section 55(5) extends this right to subsequent owners but the cost of removal or re-alignment would have to be borne by such owner. There are similar provision in the 1990 Act at ss 14(1),(2) and (5). The plaintiff is not without legal redress.

OTHER ISSUES

[46] There is one further matter that warrants mention. The list of agreed issues is an important document in a trial because it determines the direction of the trial. As mentioned earlier, the list filed by the parties contained only one issue for the court's determination. However, TNB in its written submissions, departed from the agreed issues and raised several other issues , and these included the defence of limitation and laches. The plaintiff strenuously argued, and I agree, that TNB is bound by the list which the parties filed at the outset of the trial. In my judgment, it would be unfair and inequitable to permit TNB to renege on the agreed issues by submitting on additional issues at the

conclusion of the trial to the prejudice of the plaintiff. I therefore ruled that the parties were bound by the singular issue that they had mutually framed to be tried.

CONCLUSION

[47] On the evidence, I find that the plaintiffs did not demonstrate that there was continuing trespass.

[48] For the reasons given, the plaintiff's claim is dismissed with costs of RM30,000.

Claim dismissed with costs of RM30,000.

Reported by Afiq Mohamad Noor